United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1280

To be argued by
DAVID J. GOTTLIEB

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

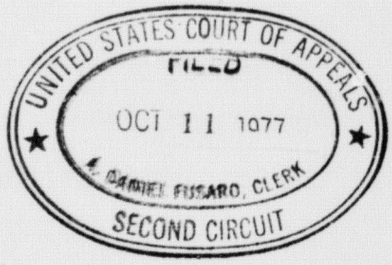
Plaintiff-Appellee,

-against-

JUAN RAMON VASQUEZ, a/k/a "Ramon Ramos," and JOHN NARVAEZ,

Defendants-Appellants.

Docket No. 77-1280



BRIEF FOR APPELLANT
JOHN NARVAEZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- JUAN RAMON VASQUEZ, a/k/a "Ramon Ramos," and JOHN NARVAEZ, Defendants-Appellants.	Docket No. 77-1280

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the evidence of appellant Narvaez' two telephone conversations was insufficient to prove his guilt of conspiring to distribute narcotics.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Honorable Lawrence W. Pierce, J.), entered June 1, 1977, convicting appellant John Narvaez of conspiracy to distribute and to possess heroin with the intent to distribute it, and sentencing him to the custody of the attorney general for one year and one day, with a three year special parole term.

The Legal Aid Society, Federal Defender Services Unit was continued on the appeal pursuant to the Criminal Justice Act.

Statement of Facts

By Indictment No. 77 Cr. 133,* appellant John Narvaez and seven other co-defendants were charged with conspiracy to distribute heroin and possession with intent to distribute, in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A). The Government's theory of the conspiracy was related at trial by undercover officer Stephen Caracappa, who made four purchases of heroin from co-defendants Juan Raymond Vasquez and Luis Angel Reyes. In the course of the purchases Caracappa inquired about obtaining larger amounts of heroin in Chicago. Eventually a trip to Chicago was arranged through the auspices of co-defendant Aurea Vasquez. Appellant, John Narvaez, the common-law

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*The indictment is set forth as "B" to appellant's separate appendix. The indictment also charged four substantive counts, none of which involved appellant Narvaez.

husband of Aurea Vasquez, was alleged to have participated in the conspiracy solely due to the two telephone conversations he had with the undercover officer prior to the trip to Chicago. Eventually the undercover officers travelled to Chicago in the company of Juan Vasquez and Aurea Vasquez where they met co-defendants Enriqueta Colon and Jose Agosto-Concepcion. After further negotiations in Chicago, but before the sale was completed, arrests were made of the Chicago defendants.

On April 7, 1977, appellant Narvaez and two co-defendants, Juan Raymond Vasquez and Enriqueta Colon, began trial before the Honorable Lawrence W. Pierce.*

The Government's initial and chief witness was Stephen Caracappa, an undercover police officer with the Drug Enforcement Task Force (48-49),** whose testimony was later supplemented by Officer John Bruno. Caracappa revealed that on December 23, 1976, he first spoke with co-defendant Vasquez who offered to sell him heroin at $1,500 per ounce. On January 3, 1977, Caracappa was introduced in person to Vasquez by a confidential informant (50-51). That afternoon the negotiations began in earnest.*** Vasquez offered to sell a half ounce of heroin

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*Because the sole issue raised by appellant Narvaez is sufficiency of the evidence, the evidence here related is that most favorable to the Government. See Glasser v. United States, 315 U.S. 60 (1942).

**Numerals in parentheses refer to pages of the trial record.

***The trial record indicates that the first purchase of heroin occurred on January 7, 1977 (51-54).

(51-52), and twenty minutes later, at a bar at 133 Avenue D, Caracappa met Vasquez and another individual, one Luis Reyes, who handed the officer a half-ounce of brown heroin (53-54, 57). Three days later, the officer met again with Vasquez. After informing Vasquez that the heroin "wasn't that good" (58), the officer stated he remained interested in purchasing more heroin. Vasquez replied that they had just received two or two and one-half kilograms of heroin from Chicago. Arrangements were made to purchase four half-ounces of heroin, and the following day Caracappa made the purchase from Vasquez and Reyes (59-60). In discussion following the purchase, Reyes said they had obtained this heroin from Chicago by means of a courier named "Mike" for $1,000 per ounce and that in the future they could talk about still larger purchases (61-62). Caracappa stated he was interested and that he might wish to go to Chicago himself to purchase heroin (63).

Caracappa's next meeting with Vasquez and Reyes was on January 11, 1977, at Vasquez's apartment on 713 East 9th Street (64). During the meeting, Vasquez showed the officer five ounces of heroin (65),* and the following date, the third purchase of narcotics was made at Vasquez's apartment (68-69). On January 14, Caracappa called to tell Vasquez the heroin was

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*During the meeting Caracappa again discussed the possibility of going to Chicago to buy five ounces of heroin, with Reyes stating that the minimum quantity to be purchased was 24 ounces at one time (67).

of low quality. Vasquez told the officer not to worry and that from now on the officer could do business directly with Vasquez's people.

At their next meeting in Vasquez's apartment, on January 25, Caracappa agreed to purchase a pound of heroin at $1,400 per ounce (72-73). Caracappa was introduced at that time to "Mickey Flaco," the Chicago courier (74-75). The following day, accompanied by undercover detective John Bruno, Caracappa drove to Vasquez's house where Reyes handed him sixteen one-ounce packets of heroin in return for $22,400 (78-80).

On January 28th, Caracappa and Bruno again went to Vasquez's apartment and attempted to negotiate another purchase. Bruno stated he was pleased with the previous deal and was interested in purchasing even larger quantities, up to 200 ounces (84, 395); however, he and Caracappa were informed that Vasquez's brother-in-law "Dino" had just returned two kilograms of heroin to Chicago since it was "bad." Vasquez showed Caracappa a sample, and also related that heroin could be purchased in Chicago for $800 per ounce (83-84).

On January 31st, Caracappa and Bruno again went to Vasquez's apartment. There, they were introduced by Vasquez to one of his "workers," Pedro Lugo ("Pete")(85). Lugo handed Vasquez $1,300; at the same time, Vasquez asked Lugo the price of a "kilo" in Chicago, and was quoted a figure of $28,000. Detective Bruno then asked if they could purchase seven or eight kilos and was told it could be arranged, but that they should begin by buying three or four (86). Lugo stated "he was going to find out from the

lady how much the price of a kilo in Chicago was" (86) since "she knows" (400). Fifteen to twenty-five minutes after he had left, Lugo called saying he was with the "lady" and that she would make the arrangements for them to go to Chicago and purchase three kilograms of [illegible]in at $28,000 per kilo (87, 400).

The following date, Caracappa was introduced to the "lady" -- Aurea Montalvo Vasquez (282-283). Aurea told the officer she could arrange a meeting in Chicago and that, through the people in Chicago, she could make available some "white heroin" for sale (88, 293). That evening, Aurea, Juan Vasquez, Vasquez's wife, Lugo, Lugo's wife, Caracappa and Bruno went to an Eastside restaurant and discussed the upcoming trip to Chicago (89). Bruno said he wanted the trip done in one day, and Aurea expressed some doubt if it could be done that quickly (407-408). Aurea was told to order four or five kilos of heroin, Caracappa said he would make the travel arrangements. For their services in arranging this deal, Juan Vasquez was to receive a fee of $1,500, Aurea $2,000, and Lugo $1,500 (91). Aurea gave Caracappa a piece of paper with her name, address and telephone number (92). The dinner ended with the parties expecting to leave for Chicago the morning of February 3rd (93).

The following day when Caracappa called Vasquez, he was told there were some problems in Chicago because the "stuff was no good" and that he was waiting to hear from Aurea (102). Caracappa then placed a call to Aurea's residence. The call and one placed later that night were answered by appellant John Narvaez, Aurea's common-law husband. The two conversations represent the

first and last mention of appellant Narvaez during this entire conspiracy. The calls were recorded, and transcripts of the recordings were introduced into evidence at trial as Government exhibits 12 and 16 (103, 112, 133). Because of their critical importance, they are set forth as appendix D to appellant's brief.

The first call occurred at 3:31 p.m. Caracappa asked for Gloria (Aurea). After Caracappa asked when Aurea would return, appellant Narvaez replied "Who's this? Is this the guy from yesterday?" Caracappa answered yes, and the following exchange occurred:

JOHN: No, they ain't going to do it.

DET. C: Yea, well what seems to be the problem there? You know like who's this?

JOHN: Huh? This is her husband.

DET. C: Yea, well listen man, I don't know you. You don't know me.

JOHN: Right.

DET. C: But I tied up a lot of bread in this thing.

JOHN: Inaudible

DET. C: A lot a people I had to pull people back. I mean, can it be done later or why what am I going to tell my people.

JOHN: I don't think they're going to do it.

DET. C: Why?

JOHN: They can't. It's no good. They turned it back themselves.

DET. C: On, they turned the stuff back? I mean

DET. C: (con't) is there any chance - is the stuff going to come out? I mean, you know, what am I going to do with this money? I'm into for a lot of money. We had to take some money off some shys. It's costing me over a grand a day to keep the money out. I don't know whether to hold it or turn it back in. You know I'm in a bad position now.

JOHN: Inaudible -- It's true it's going to be for a while. You may as well try some other place. You know, I don't know I'm waiting for these guys to call, but they haven't called.

GX12 at C1-2.

Caracappa continued to complain saying that his people were very upset, and he inquired of appellant Narvaez whether there was anything that could be done:

DET. C: When is the next one coming in? Maybe we could - I could keep my man out there. I can't be sending that money back and forth.

JOHN: Huh, no, I really wouldn't know, I'm pretty sure it will be a while. You know maybe another week or month. Who knows.

DET. C: Another week or month? How much stuff could they have turned back?

JOHN: I really don't know.

DET. C: You don't know?

JOHN: The amount.

Id. at C3.

The conversation ended on the following note:

DET. C: You think I can get some more information later on?

JOHN: I don't know. Huh, look give me a call.

JOHN: See what happens.
(con't)
DET. C: O.K. What's your name?

JOHN: Johnny.

DET. C: Johnny, huh? This is Frankie. Frankie Flaco.

JOHN: Alright.

DET. C: Alright, I'll call you in about an hour, an hour and a half.

JOHN: O.K.

DET. C: Alright, Bye, bye.

JOHN: Bye.

Id. at C4.

Following Caracappa's first call, Seargent Bruno placed a call to Aurea's residence and spoke with both Juan Vasquez and Aurea. In the conversation Vasquez said that the deal had been postponed because the heroin was of low quality, but assured Bruno that the people in Chicago were going to call "her" that evening (GX 14 at 4). Aurea stated that the Chicago connection would call back, and told him to call her at about 8:00 p.m. (GX 14 at 5).

At 9:00 p.m. that evening, Caracappa placed the second call answered as follows by John Narvaez:

JOHNNY: Hello.

DET. C: Hello, huh, Gloria.

[Noise in background-pause]

JOHNNY: They haven't called back yet these people.

DET. C: Huh, huh, alright, are they going to call

DET. C: (con't) back tonight because I got to bring that man back.

JOHNNY: I don't know, I really can't give you no, maybe tomorrow morning or tonight, you know.

DET. C: Alright is Senorita Gloria [Aurea] there?

JOHNNY: Huh?

DET. C: Is Senorita Gloria there?

JOHNNY: What was that?

DET. C: Is Gloria there?

JOHNNY: Yea.

GX 16 at E1.

Aurea Montalvo then talked to Caracappa explaining that they "haven't called me up yet" but that they might call again the next morning. Arrangements were then made for Caracappa and Aurea to get in touch the next morning (GX 16 at E2-3).

There is absolutely no mention of appellant Narvaez in the narration of the conspiracy following the two February 2nd conversations. On February 3rd, Seargent Bruno called Vasquez to find out if the deal was going to go through. Vasquez said that Aurea was not home, but he said he would go see her to find out what was happening (GX 18 at F5). The following day, February 4th, Aurea told Vasquez and Caracappa over the phone that the arrangement had been finalized and that they could go to Chicago the next day (137-138). She arrived at the apartment later that day to confirm the trip.

On February 5th, Aurea, Juan Vasquez, Bruno and Caracappa

flew to Chicago, where they were met by undercover agent Frank Tucci (148-149).

After their arrival in Chicago, Aurea placed a call and they informed Caracappa and Bruno that the "connection" would be over in about one hour (150, 428). Later that day, Caracappa, Aurea and Tucci went to an apartment at 3126-3128 West Cortlandt Street in Chicago, and were introduced to the third co-defendant standing trial, Enriqueta Colon (152). After further negotation at Colon's, a meeting was arranged at a bar called the Luis Pump tavern, but no exchange took place (157). Aurea apologized to Caracappa, saying that she had once waited two weeks in Chicago for a package to arrive (159). She returned and attempted to reach another connection, an endeavor which eventually resulted in a meeting between Caracappa and another co-defendant, one Jose Agosto-Concepcion (159-161). Two days later, a deal still not having occurred, Aurea and Vasquez, and Caracappa and Bruno returned separately to New York (169-170), leaving agent Tucci with the money to try to complete the deal (435).

In addition to the testimony and exhibits offered by Caracappa and Bruno, the Government introduced the following evidence: Agent Francis P. Tucci testified to the continued negotiations for the heroin deal in Chicago, which resulted in his receipt of a "sample" of heroin from Conception at Colon's apartment, and of the arrest of Conception before any consummated transaction (479-481, 488-490); Agents Andrew Pucher,

Joseph Keefe, Joseph Scamardella, and Arthur Drucker, gave surveillance testimony concerning Caracappa and Bruno's meetings with Juan Vasquez, Aurea, Lugo and Reyes (542, 549-562, 569-573, 574-576, 576-578), but never produced any surveillance testimony concerning appellant Narvaez; and Agents Kenneth Rhodes, Christopher Hacias, Thomas Chown, Keith Leoni, and William Furay testified concerning surveillance, a search and the arrests of the Chicago defendants (586-592, 605-611, 613-615, 616-624).

Finally, the Governement introduced into evidence a statement given by appellant John Narvaez to an Assistant United States Attorney at the time of his arrest in which Narvaez stated he didn't know much about "this whole thing," that he'd never been to Chicago, and that he didn't really know what was going on until Aurea told him about it after her return from Chicago (592, GX 8). It was the Government's position that the Narvaez recitation was a false exculpatory statement. The defense claimed it was not false, and completely consistent with his position at trial (762-780).

Following presentation of the Government's case, counsel for Narvaez moved to dismiss on the ground that the evidence was insufficient to prove Narvaez's willful participation in a conspiracy. Citing United States v. Cianchetti, 315 F.2d 584, counsel noted that there was no proof of appellant's stake in the venture or positive attitude toward the undertaking (650-651). The Court denied the motion, holding that Narvaez had sufficient knowledge of the conspiracy to be able to comment upon

what was supposed to happen (653). The Court also stated:

> THE COURT: Let me address that. Cianchetti was a 1963 Court of Appeals decision. From 1963 until the present date there has been a slew of decisions by the Second Circuit of such a nature that I do not believe that if the issue is presented to the Second Circuit today, they would hold in the manner in which you just interpreted Cianchetti.
>
> (655).

Instead, the Court cited the 1974 Second Circuit decision in United States v. Torres (503 F.2d 1120) and United States v. Purin, 486 F.2d 1363 (2d Cir. 1973) as on point.

During the Government's summation, the following claim was made as respects appellant Narvaez's role in the conspiracy:

> ... He is talking to Caracappa, he is keeping the deal alive, he is saying tonight or tomorrow morning is when they expect to hear from them.
>
> In short, ladies and gentlemen, you may find that in the end the evidence here shows that John Narvaez knew about the Chicago deal, that he knew at least as much as anybody else on the New York end of the deal knew on February 2, 1977, and that he had a stake, the extent of which may be unclear. You may find, based on your common experience, that he might have had a much bigger role in this case than the evidence we have shows. But whether you find that or not, if you stick just with the conversations, just with the evidence that's before you and draw no inferences from that beyond the conversations themselves, you find that here is a man who knows about the transaction, you find that here is a man who is keeping that transaction alive and furthering that transaction at a critical time in the course of events here.
>
> (823-824).

Following the Court's charge* the jury found appellant Narvaez guilty of conspiracy. This appeal followed.

ARGUMENT

THE EVIDENCE OF APPELLANT'S TWO TELEPHONE CONVERSATIONS WAS INSUFFICIENT TO PROVE APPELLANT'S GUILT OF CONSPIRING TO DISTRIBUTE NARCOTICS.

At the close of the Government's case, counsel for appellant Narvaez moved for a judgment of acquittal on the ground that the evidence was insufficient to support a conviction against appellant for conspiracy to distribute narcotics. Discounting the authority cited by counsel, the court ruled that appellant's activity showed his knowledge of the venture, and that Narvaez's role in the conspiracy was his serving as a communication link between the Chicago contacts and the agents. We respectfully submit that both legally and factually the Court's conclusion was incorrect.

In order to prove appellant's guilt of conspiracy, the Government was required to prove not only that appellant knew of the conspiracy, but that he "intended to participate in it or to make it succeed." United States v. DiStefano, 555 F.2d 1094, 1103 (2d Cir. 1977); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974); see, United States v. Johnson, 513 F.2d 819, (2d Cir.

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*The charge is set forth as "C" to appellant's separate appendix.

1975); United States v. Amato, 495 F.2d 545, 550 (5th Cir. 1974). In order to prove participation, "[t]here must be something more than '[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy ....' This 'something more' is generally described as a 'stake in the venture.' 'In prosecutions for conspiracy ... [the defendant's] attitude towards the forbidden undertaking must be more positive ..... he must in some sense promote the venture himself, make it his own, have a stake in the outcome.'" United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963)(citations omitted); see, United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975), cert. denied, 96 S.Ct. 2167 (1976); see, United States v. Johnson, supra, 513 F.2d at 823.

Here, the proof was barely sufficient to allow the jury even to conclude that appellant Narvaez had the most meager and incomplete knowledge of the conspiracy to distribute heroin. More significantly, the record is simply devoid of evidence that appellant Narvaez played or intended to play any role in furtherance of the conspiracy or that he had any stake whatsoever in the outcome.

The only evidence in the record which even mentions, let alone incriminates, appellant is the two conversations between appellant and Officer Caracappa on February 2nd. The first conversation demonstrates, at the very outset, appellant's limited knowledge of the transaction, and emphasizes even more his lack of interest in promoting it. Several times, appellant Narvaez responded to Caracappa's question about how long the

deal would take or whether a deal could be made on the next shipment by replying, "I don't know" (GX 12 at C2, C3). Further, to the extent appellant Narvaez gave any information at all to Caracappa, the information disclaimed any possibility of a deal, rather than encouraging the possibility. Moreover, the conversation fails to reveal any personal involvement of Narvaez in the transaction. In fact, his discussions are almost exclusively in third person. Thus, upon ascertaining Caracappa's identity, appellant immediately stated: "No, they ain't going to do it." (Id. at C1)(emphasis supplied). After Caracappa complained yet again, appellant replied, "I don't think they're going to do it" since "They can't. It's no good. They turned it back themselves." (Id. at C2)(emphasis supplied). When Caracappa continued, saying he could not put the deal off another day, appellant Narvaez once again stated he really did not know when another shipment would be ready:

> It's true it's going to be for a while. You may as well try some other place. You know, I don't know, I am waiting for these guys to call, but they haven't called.
>
> (Id.)(emphasis supplied).

Later, Narvaez repeated that it would be "a while" before a deal could be worked out and he was unable to guarantee that he could give any information to the officer at a later time (Id. at C3).

Even more indicative of appellant's lack of knowledge, participation and stake in the venture was the second conversation,

in which appellant did not even state that the "people" had failed to call back before an apparent consultation with his wife, Aurea Vasquez, and in which he repeated that he could not state when they would call back. Moreover, it is notable that Aurea Vasquez quickly came to the phone and stated that the connection hadn't called her yet, but that they might call the next morning (GX 16 at E2).

In short, the telephone conversations show, at most, that appellant Narvaez possessed a minimal amount of knowledge about the conspiracy in which his wife was heavily involved. They fail to show that appellant played any role at all in arranging, promoting or assisting the outcome, or that he had any stake in the venture. His lack of personal involvement is revealed not only by his constant use of the third person, but by the fact that he actively discouraged the officer and invited him to go elsewhere for his heroin purchases. See United States v. Cianchetti, supra; United States v. Steinberg, supra.

The utterly trivial and insufficient amount of evidence against appellant is highlighted in the context of the case as a whole. The negotiations for this conspiracy went on well over a month; there were numerous meetings, many of which were taped and transcribed by the officers; there was surveillance of virtually all the participants; and there were multitudes of conversations by the officers with people like Vasquez and Enriqueta Colon who talked freely of their lives and acquaintances in the narcotics trade and introduced many of the individuals

of whom they spoke to the officers. Yet there is no mention in any of the conversation admitted into evidence of appellant Narvaez, and absolutely no surveillance testimony showing him associating with any of the conspirators. Indeed, the only conspirator with whom Narvaez was shown to have even a social relationship was Aurea, his wife, a fact which is hardly unusual and affords no basis for criminal liability.

While the court below found sufficient evidence that appellant was a communications link in the conspiracy between the officer and the Chicago people, it is clear that that role was not occupied by appellant but by his wife Aurea. Aurea was the "lady" who Lugo stated knew the price of a kilo in Chicago; Aurea came to Vasquez's apartment to arrange the trip; Aurea accompanied the officers to the restaurant and maintained constant telephone communication; Aurea travelled to Chicago; Aurea knew Enriqueta Colon and the Chicago defendants.

Further, the legal precedents cited by the Court below to support its finding not only are distinguishible, but by contrast highlight the insufficiency of the evidence here. Thus, in United States v. Purin, 486 F.2d 1363 (2d Cir. 1973), cert. denied, sub nom. DaSilva v. United States, 416 U.S. 987 (1974), a co-defendant, DaSilva, claimed the following evidence insufficient to show his willful participation in the conspiracy: two agents had come to his store, stating they were in the cocaine business and "wanted a connection." DaSilva told them he could line something up, and urged them to call back later.

Later that night, the agents returned to his store and he made a phone call, quoted a price to the agents, and, when the agents said it was too high, he assured them the cocaine was of high quality. 486 F.2d at 1365. DaSilva set a date for the purchase and the night of the intended purchase he introduced the agents to an individual who subsequently sold them drugs.

Not surprisingly, the court found the evidence that DaSilva knew he was dealing with cocaine dealers, his making of the initial contact, his negotiation of price and extolling the quality of the drugs was sufficient evidence of his participation to permit the jury to infer he was more than a "casual conduit" "doing a casual favor for a friend." Id. at 1369. Compare, United States v. Torres, 519 F.2d 723, 726 (2d Cir.) cert. denied, 423 U.S. 1019 (1975)(membership in conspiracy not established by individual merely telling a willing buyer how to make contact with a willing seller).

Here, unlike Purin, there was no extolling of the product; in fact, appellant told Caracappa he should go elsewhere. Appellant, here, did not make a contact, set a price, or even give a date the transaction might occur. He merely answered a telephone call placed to his wife, with expressions showing no great knowledge of or participation or stake in the conspiracy.

Even further afield was the Court's citation of United States v. Torres, 503 F.2d 1120 (2d Cir. 1974) as support for its decision. There, the defendant had actually arranged and participated in an abortive heroin transaction, with the question to

be decided whether that "single act" gave sufficient knowledge of the broader conspiracy. 503 F.2d at 1123-1125. Here, appellant Narvaez was not present at any time when heroin was exchanged.

However, far more on point is United States v. Cianchetti, supra. There, a meeting was arranged between one Warycha, a Government agent, and defendant Cianchetti to discuss the importation of heroin. In conversation, Cianchetti showed extensive knowledge of the importation scheme, and arranged a future meeting. At the second meeting, when Warycha called and said he had three kilograms of heroin, Cianchetti at first disclaimed interest in the heroin, but later, when Warycha threatened to go elsewhere, said he "might be able to help him out." 315 F.2d at 587. Finding that Cianchetti's statements were equivocal, the court held that despite his vast knowledge of the conspiracy, he had evinced no "fixed agreement" to participate. Here, as in Cianchetti, appellant's statements were equivocal at best, perhaps even disclamatory. Here, as in Cianchetti, the suggestion to the officer that he call back later does not establish willful participation in a conspiracy. Here, as in Cianchetti, there was no evidence of a stake in the venture. Unlike Cianchetti, however, in this case there was not even evidence that appellant possessed wide-ranging knowledge or that he had any kind of a role, even contemplated, in the conspiracy. And, while the court below "distinguished" Cianchetti by arguing it was no longer of any vitality, that view is

refuted by the recent cases, such as United States v. Steinberg, supra, 525 F.2d at 1134, which cites Cianchetti approvingly.

It cannot be argued that the Government's case is aided by appellant's so-called false exculpatory statement, since:

> ...falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof upon which to convict where other evidence is weak and where the evidence before the Court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt.
>
> United States v. DiStefano, supra, 555 F.2d at 1604.

See United States v. Johnson, supra, 513 F.2d at 824; United States v. Steinberg, supra, 525 F.2d at 1134; United States v. Kearse, 444 F.2d 62 (2d Cir. 1971). Here, to this general rule it should be added that the so-called false statement was totally consistent with defendant's position at trial as well as the telephone calls themselves, since the calls confirm appellant's later statement that he really didn't know much about the "whole thing." Indeed, the weakness of the statement was recognized by the Assistant United States Attorney, who failed even to allude to it in summation.

In the last analysis, therefore, the evidence showed appellant without even the most casual role in this case and without any intent or agreement to further the conspiracy. While he was unquestionably the common-law husband of one of the conspirators, that fact alone cannot establish his participation. The total inability of the Government to prove appellant's

willful participation in the conspiracy is perhpas best exemplified by the Assistant United States Attorney's remark in summation that "You may find, based on your common experience that [appellant] might have had a much bigger role in this case than the evidence we have shows." (824). This comment was more than an improper invitation to the jury to speculate on matters not in the record or an implication that the Assistant United States Attorney might possess evidence not possessed by the jury (see, e.g., United States v. Grunberger, 431 F.2d 1062, 1069 (2d Cir. 1970)); it was, in the context of this case a substantial, albeit unintentional, acknowledgement of the weakness of the case against appellant.

CONCLUSION

For the above-stated reasons, the judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

October 11, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

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